MATERNITY BENEFITS TO PREVENT DISCRIMINATION AT THE WORKPLACE: A COMPARATIVE ANALYSIS

SHORT SYNOPSIS

Submitted in partial fulfilment of the requirement of the degree of

DOCTOR OF PHILOSOPHY

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Manav Rachna University

by

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2K21-PFL-001

Under the supervision of

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MANAV RACHNA
vidyanatariksha
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(FORMERLY MANAV RACHNA COLLEGE OF ENGINEERING
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DECLARATION

I hereby declare that the short synopsis ***"Maternity benefits to prevent discrimination at the workplace: A Comparative Analysis"*** being submitted in partial fulfilment of the requirement for the degree of Doctor of Philosophy in **Faculty of Law** of Manav Rachna University, Faridabad during the academic year **2021**.

It is a bona-fide record of original work carried out under the supervision of **Prof. Dr. Versha Vahini** and **Dr Tarundeep Kaur**, and has not been submitted in full or part to any other university or institute for degree or diploma.

Further, it is certified that proposal is within the plagiarism limit and copy of the same is attached as per University norms.

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ABSTRACT

"Women in this country have striven for their rights, for equality of status, for justice and fair play and most of all to be able to take their part in responsible work in the service of their country." [1]

- Renuka Ray, 18 July 1947

The idea of maternity leave and benefits arises from health concerns and for the well-being of pregnant women and new mothers. The purpose is not only to protect the woman, but also to cater to the upbringing of the child. Maternity benefits acknowledge childbirth as physically and psychologically exhausting, and recognize the need to have statutory provisions that protect the welfare of the mother and child. There are several legislations, in India, that further the principles laid down in the Constitution. The provisions in these laws are in consonance with the international framework. The most significant maternity law is the Maternity Benefit Act, 1961, which was notably amended in 2017.

However, the implicit assumption of maternity laws is that men are the breadwinners, while women are dependents entrusted with the responsibility of caring for the family. Though there have been amendments to the legal framework, there still exist limitations that need to be addressed. Creation of gender-inclusive parental benefit laws could help move beyond the public-private dichotomy, prevent gender-segregation in the labour market, and promote employment equity. Positive intervention by the government, and creation of social schemes that increase its responsibility and accountability, would further help prevent the conflict of production-reproduction, that is inherent in the workplace.

The researcher tries to critically analyse the maternity benefit laws in India to address the rampant gender discrimination at the workplace. For this, the researcher proposes to adopt a comparative study of alternate models of maternity benefits, and explore the feasibility of State-funded parental benefits in a heavily populated country such as India.

(Word count – 300)

Keywords – productive and reproductive labour,
maternity laws, parental benefits, gendered division of labour

[1] Constitutional Assembly Debates (Proceedings) on July 18, 1947 *available at* http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C18071947.html (last visited on May 26, 2021)

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1. INTRODUCTION OF THE TOPIC/ AREA

The issues of gender inequality are not new. Gender gaps are more significant in developing countries, such as India, than in rich ones. India's rank in the Global Gender Gap Index, 2020 is 112 out of 153 countries.[2] Already existent gendered-discriminatory have been exacerbated in the current context. The rise of capitalism is to be blamed for an increasing gap between economic reproduction, and social reproduction. The former is found in factories and offices, and attract remunerative benefits; whereas the latter is non-remunerative and confined to the domestic sphere.[3] This distinction is one of the reasons that women face discriminatory practices at the workplace. They tend to start at lower positions, and consistently make less money than men in almost all industries.[4]

Protecting men and women against job discrimination is necessary for achieving gender equality at work. One step to do so is by safeguarding the health of women during pregnancy and post child-birth. Policies that help workers raise families with financial security, cater to their care and welfare. Feminist scholars are of the opinion that welfare state has been designed essentially by men, an aspect noticeable in maternity leave programs.[5] Such policies are drafted with the assumption that many working women are ineligible for statutory benefits because they hold part-time or temporary positions. Similar concerns have been brought before the courts of India, and in many such disputes, the Supreme Court has extended the reach of maternity laws, extending it to temporary, daily-wage[6], and contractual workers. [7] Scholarly articles are indicative that maternity leave is often equated with the time taken away from waged-employment, to recover from childbirth or adoption.[8]

Key factors such as higher education & skills development of women, arrangements for optimal child bearing and child care, and safety in workspaces & in public spaces can help increase

[2] World Economic Forum, "Global Gender Gap Report, 2020" (December, 2020)
[3] Saumya Uma and Aditya Kamath, "Gamechanger or a trojan horse?: Some reflections on the Maternity Benefit Act, 1961," 55 *Economic and Political Weekly* 59–65 (2020).
[4] Ellen Isaacs, "Gender Discrimination in the workplace: A Literature Review," 38 *Communications of the ACM* 58–9 (1995).
[5] Maureen Baker, "Parental Benefit Policies and the Gendered Division of Labor," 71 *Social Service Review* 51–71 (1997).
[6] *Municipal Corporate of Delhi v Female Workers (Muster Roll),* (2000) 3 SCC 224
[7] *Shalini Pathak v State of Uttarakhand*, 2014 SCC Online Utt 2233
[8] Meina Liu and Patrice M. Buzzanell, "Negotiating maternity leave expectations: Perceived tensions between Ethics of Justice and Care," 41 *Journal of Business Communication* 323–49 (2004).

women's workforce participation rates and reduce their time spent on housework. The Government of India has put significant efforts to develop laws and social welfare schemes that encourage women in the workforce. The Constitution of India also directs the State to provide "*just and humane conditions of work and for maternity relief."*[9] Expectant and nursing mothers require adequate care and time before and during child-birth. Not only do they need special protection to protect the health of their infant, but also need time to recover from physically, emotionally, psychologically. On the other end of the balancing scale is the need to be protected from arbitrary termination of employment on grounds of pregnancy or maternity leave. This balance ensures the equal access of women to employment, along with the continuation of often vital income, which is necessary for the well-being of their entire family.

The primary legislation that lays down provisions for maternity benefits is the Maternity Benefit Act, 1961, (*hereinafter Act*) read with the 2017 Amendment. The Maternity Benefit Act enables women to *"transcend the public-private dichotomy"* and stake their claim for productive participation in the labour force.[10] In 2017, the Act was amended to increase the maternity leave from 12 weeks to 26 weeks[11]. It introduced Section 11A[12] which obligates establishments to provide creche facilities. In addition to the national legislations, the international framework also provides numerous instruments and conventions for women's rights and labour laws. The foundation is laid by the International Labour Organisation's Maternity Protection Convention, 2000, also known as Convention No. 183. It provides a *"minimum of 14 weeks of paid maternity leave"*[13], cash benefits *"equivalent to two-thirds of woman's previous earnings"*[14], and prevents a pregnant woman from exposure to work that could be harmful to her health[15]. India has not ratified the Convention.

Despite amendments to national legislations that prevent discrimination and provide special protection at the workplace, many women continue to face difficulties in using the policies.

[9] The Constitution of India, art. 42
[10] Saumya Uma and Aditya Kamath, "Gamechanger or a trojan horse?: Some reflections on the Maternity Benefit Act, 1961," 55 *Economic and Political Weekly* 59–65 (2020).
[11] The Maternity Benefit Act, 1961, s. 5(3)
[12] The Maternity Benefit Act, 1961, s. 11A
[13] Maternity Protection Convention, 2000, art. 4
[14] Maternity Protection Convention, 2000, art. 6
[15] Maternity Protection Convention, 2000, art. 3

"Good intentions do not always make good laws."[16] The purpose of the Maternity Benefit Act is to protect women's employment, and the well-being of women and children during maternity with paid absence, and related benefits. Though the legislature has an optimistic intention while extending the number of paid leaves, but companies may face an added responsibility while employing women. This discomfort could prevent the objective of the Act from truly being recognised. In India, the financial burden of paid maternity leaves is borne solely by the employer, making it one of the only countries to have this law. The International Labour Organization, too, has recommended inculcating a system to shift the burden from the employers' shoulders and transfer the financial pressure of maternity leaves to the State.[17] Reducing parental leave benefits to maternity leaves only fortifies the notions of female domesticity.[18] It discourages the employer from hiring women of a child-bearing age.[19] Not only does this have a tendency to further deepen the public-private divide, but also discourages gender equality, thus amounting to a violation of Article 14[20] of the Indian Constitution.

[16] Vineet Bhalla, "The case against Maternity Benefit Act 2017", *Spontaneous Order*, 6 August 2018, *available at* https://spontaneousorder.in/the-case-against-maternity-benefit-act-2017/ (last visited on 2 June 2021)
[17] International Labour Organization, "Maternity and Paternity at work: Law practice across the world" xv (May 2014)
[18] Saumya Uma and Aditya Kamath, "Gamechanger or a trojan horse?: Some reflections on the maternity benefit act, 1961," 55 *Economic and Political Weekly* 59–65 (2020).
[19] Maureen Baker, "Parental Benefit Policies and the Gendered Division of Labor," 71 *Social Service Review* 51–71 (1997).
[20] The Constitution of India, art. 14

2. LITERATURE REVIEW

Gender discrimination

i. **Ji-Hye Kim et al.[21] (2019)** investigate the relationship between experiences of childbirth and pregnancy, to gender discrimination, among working women between 19-45 in South Korea. They conduct empirical research to evaluate discrimination on a six-point scale. The authors acknowledge the policies implemented by the government but make suggestions for the complete elimination of gender discrimination at the workplace.

ii. **Pallavi Mahajan[22] (2019)** analyses the potential impacts of inserting provisions for paternity leaves in India. She discusses the importance of equal participation of both parents in the upbringing of the child, and the possibility of better representation of women at the workplace upon introduction of paternity leaves. Analysing the Paternity Leave Bill, 2017, the author suggests having a parental policy instead of distinguishing between maternity and paternity benefits.

iii. **UN Women (2017)[23]** in discussion with the Nordic Council of Ministers addressed the issue of paid paternity leave. They listed some factors that contribute to underrepresentation of women in the workforce, including the lack of paid paternal leaves. Dagfinn Høybråten, the Secretary General of the Nordic Council of Ministers, highlighted that affordable child care as a basic security was necessary for flexibility in the labour force. UN Women Executive Director, Phumzile Mlambo-Ngcuka emphasized how *"motherhood penalty"* manifests itself as perceived incompetence, which result in unequal pay, and slower career growth among working mothers. Legislations and regulations have the capacity to change cultural norms, which could facilitate the equal participation of both men and women in care work at home.

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[21] Ji-Hye Kim et al., "Gender Discrimination in the Workplace: Effects on Pregnancy Planning and Childbirth among South Korean Women," 16 *International Journal of Environmental Research and Public Health* 1–12 (2019).

[22] Pallavi Mahajan, "Fathers, Paternity Benefits and Gender Norms," 1 *SSRN Electronic Journal* (2019).

[23] UN Women, *Parental leave is the key to economic prosperity,* 21 September 2017, *available at* https://www.unwomen.org/en/news/stories/2017/9/news-parental-leave-is-the-key-to-economic-prosperity (last visited on 30 July 2021)

iv. **Jennifer E. Karr[24] (2017)** applies a reconstructive feminist perspective to the issue of parental leave. Through a comparative analysis of paternity leaves in Scandinavian countries to the Family Medical Leave Act enacted in the United States of America, she develops a paternity compensation package that should have six main aspects. As per the author's research, employers are reluctant to hire or promote women because the latter have an inherent responsibility towards the family and are likely to take time off to provide physical and emotional care. It is her opinion that incentivised paternity leave can increase productivity in the workplace, and for this she suggests a four-point proposal to promote this.

v. **Ira Chadha-Sridhar and Geetika Myer[25] (2017)** employ a critical feminist lens to maternity laws in India. The authors criticize the use of the *"individual rights-justice model"*, which in their view, reproduces public-private dichotomy, thereby resulting in a devaluation of the work of care within the private sphere. The rights-justice model categorizes work of care as "*merely reproductive*", and not as "*transformative labour"*. They suggest a re-evaluation of the Maternity Benefit Act, and the creation of social insurance schemes.

vi. **Zaiton Othman & Nooraini Othman[26] (2015)** list the discriminatory practices faced by women employees at the workplace, reflected in all stages from hiring, to promotion, and also during job assignments, or termination. Along with discrimination, women also face various form of harassment. To address these issues, they suggest the first step as making a woman aware of the existence of discriminatory practices. Further, education and special training courses can enhance their knowledge base, thus helping tackle internal and external discriminations. The authors highlight the importance of the government to develop strategies, prepare anti-discriminatory laws, and proper guidelines which can help handle claims of

[24] Jennifer Karr, "Where's My Dad? A Feminist Approach to Incentivized Paternity Leave," 28 *Hastings Women's Law Journal* 225 (2017).
[25] Ira Chadha-Sridhar & Geetika Myer, "Feminist Reflections on Labour : The 'Ethics of Care' Within Maternity Laws in India" 13 *Socio-Legal Review* 1–19 (2017).
[26] Zaiton Othman & Nooraini Othman, "A Literature Review on Work Discrimination among Women Employees" 11(4) *Asian Social Science* 26 (2015).

gender inequality. A collective effort by the government, employer, and educational institutions can nip the issue in the bud.

vii. **Kelli García[27] (2012)** studies the social and cultural contexts in which maternity law is applied at a workplace. The statute in consideration – the Family and Medical Leave Act – was enacted with the objective to promote gender equality, but contrary to its purpose, it has maintained the status quo of workplace discrimination and gendered division of labour. Like her counterparts, she too refers to the legal framework of Scandinavian countries, to draw inspiration on the reforms needed in the existing legislations. The author argues that men are viewed first as providers, and then as caregivers, whereas women are seen in the opposite categorization. The result – stereotyping continues to exist, despite the "apparently" gender-neutral parental laws. The author suggests policies, including paid family leave, to promote equality and equity at the workplace.

viii. **Patrice M. Buzzanell & Meina Liu[28] (2005)** interviewed fifteen women from a great variety of occupations, and engaged in discussion to study their workplace experiences during pregnancy, maternity leave, and upon returning to work. The common finding among all respondents is the discouragement they faced about their employment around the time of examination of their maternity leaves. The authors highlight the struggles faced by women, preventing them from constructing preferable identities. The authors highlight the role that a poststructuralist feminist lens plays in a gendered discourse, and differentiate it from the traditional approaches of labour force analysis.

ix. **Meina Liu & Patrice M. Buzzannell[29] (2004)** analyse the tensions arising at the overlap among Rawlsian justice, traditional justice, and ethics of care. They state three interconnected discursive processes where justice-care tensions are most likely

[27] Kelli García, "The Gender Bind : Men as Inauthentic Caregivers," 20 *Duke Journal of Gender Law & Policy* 1–43 (2012).
[28] Patrice M. Buzzanell and Meina Liu, "Struggling with maternity leave policies and practices: A poststructuralist feminist analysis of gendered organizing," 33 *Journal of Applied Communication Research* 1–25 (2005).
[29] Meina Liu and Patrice M. Buzzanell, "Negotiating maternity leave expectations: Perceived tensions between Ethics of Justice and Care," 41 *Journal of Business Communication* 323–49 (2004).

to emerge – overt processes; covert practices; and institutional use of standard operating procedures. Through their empirical study of fifteen respondents, they are able to show that within specific interactional contexts, feminist ethics have a higher utility in discussing maternity leave. According to the authors, the feminist ethical approach addresses gendered phenomenon, and identifies the need for female-centred solutions in a male-centred organising process.

x. **Maureen Baker[30] (1997)** examines three models of parental leaves in the countries of Canada, Sweden and United States. She compares the policies that give maternity leave, paternity leave, and those that employ a laissez-faire approach. The author acknowledges that social, cultural, and political factors play an important role in the framing of the policies. Through her research she establishes that gender division of labour continues to exist within and outside the home. Each model has its advantages and disadvantages, but the common point among all is the need for government intervention to promote gender equity.

Analysis of the Maternity Benefit Act, 1961 and its Amendments

xi. **Saumya Uma & Aditya Kamath[31] (2020)** critically analyse the amendments introduced in the Maternity Benefit Act, 1961. They emphasise on social responsibility of the employer and advocate the need for the State's deep engagement with the policy of paternal benefits. Through their paper, they identify labour legislations, social legislations, and international conventions that focus on women's issues. The authors address four major amendments of the Act, that are juxtaposed with feminist and constitutional principles, as well as ground-level realities and practices. They then go ahead to suggest three remedial measures which increase State's engagement.

[30] Maureen Baker, "Parental Benefit Policies and the Gendered Division of Labor," 71 *Social Service Review* 51–71 (1997).
[31] Saumya Uma and Aditya Kamath, "Gamechanger or a trojan horse?: Some reflections on the Maternity Benefit Act, 1961," 55 *Economic and Political Weekly* 59–65 (2020).

xii. **Jessamine Mathew[32] (2019)** analyses the purpose of the Maternity Benefit Act, 1961 read with the 2017 Amendment and the Employees' State Insurance Act, 1948. According to the author, the Maternity Benefit Act facilitates a young mother's ability to participate in the workforce, without being hindered by childbearing and child-rearing responsibilities. However, the Act provides *"gendered benefits"* that are not extended to male employees. To prevent gender discrimination at the workplace, the author suggests three measures, which will help re-orient societal structure.

xiii. **Lalit Dadwal & Kusum Chauhan[33] (2018)** study the national legislation that provides maternity benefits in India. They trace the growth of the law and provide insights to the international framework. The authors support their research with the stance taken by the judiciary in transforming the maternity laws in the country. Finally, they provide a critical analysis of the provisions of the act, and highlight ambiguities in the law. The authors suggest sharing maternity benefits burden among employer and State, so that the objectives are better achieved.

xiv. **B. Patnaik, Ipseeta Satpathy & Mitu Agarwal[34] (2014)** carry out empirical research to capture the awareness of women employees on Maternity Benefit Act, in the semi-rural areas. They collect data from 200 married women in the semi-government schools by the use of questionnaires, and then analyse it using SPSS. Through their research they are able to show the lack of awareness of the maternity laws. In addition to highlighting the importance of stronger enforcement of the laws, the authors also suggest that Government agencies should bear a burden to provide maternity benefits, as is the case in some other countries.

[32] Jessamine Mathew, "How Can the Maternity Benefit Act Increase Female Workforce Participation ? Interrogating the State's Role" *Economic and Political Weekly* (2019).
[33] Lalit Dadwal and Kusum Chauhan, "Maternity Rights For Working Women And Law In India : A Critical Analysis," 3 *International Journal of Social Science and Economic Research* 6883–907 (2018).
[34] B. C. M. Patnaik, Ipseeta Satpathy and Mitu Agarwal, "An introspection into awareness of maternity benefit Act 1961 in semi-urban area," 5 *International Journal of Management* 13–7 (2014).

Legal framework

xv. The Constitution of India, 1950

The Constitution of India guarantees the right to equality[35] to all persons, while also laying down special provisions for women's rights. The State is empowered to make special laws for women and children[36], and all citizens are guaranteed equal opportunity in matters related to employment in the public sector[37]. Apart from the Fundamental Rights, provisions on equality in employment can also be found under part IV[38]. It is the responsibility of the State to provide citizens with adequate means of livelihood[39], equal pay for equal work[40], and prevent exploitation or and abuse of the health and strength of workers[41]. The provision for maternity leave is also provided, under Article 42. In addition to the above, Article 46 directs the State to improve employment opportunities and conditions of working women.

xvi. Maternity Benefit Act, 1961 read with Amendment of 2017

The Maternity Benefit Act is India's primary legislation for maternity welfare. Enacted in 1961, its purpose is *"to regulate the employment of women before and after child-birth, and provide for maternity and other benefits."*[42]

It prohibits an employer from knowingly employing a woman under certain circumstance[43]. In the principal act, the section laid down a maternity leave period of twelve weeks, which has now been amended to read **twenty-six weeks**[44]. The Maternity Benefit Act provides special provisions[45] for leaves and payments, and allows a woman to take rest and nursing breaks. The 2017 Amendment inserted **Section 11A** which lays down the obligation on establishments with fifty or more employees to provide **creche** facility.

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[35] Constitution of India, 1950, art. 14
[36] *Id.*, Art. 15(3)
[37] *Id.*, Art. 16
[38] Directive Principles of State Policy
[39] *Id.*, Art. 39(a)
[40] *Id.*, Art. 39(d)
[41] *Id.*, Art. 39(e)
[42] The Maternity Benefit Act 1961, preamble
[43] Maternity Benefit Act, 1961, s. 4
[44] *Id.*, s. 5(3)
[45] *Id.*, s. 10

In addition to granting benefits to the woman, it also declares it unlawful for an employer to discharge or dismiss the woman on account of her absence during her maternity leave.[46] The subsequent section[47] prevents the deduction of wages during breaks for nursing the child. The punishment under the Act is upto 3 months imprisonment, or fine up to Rs. 500, or both.[48]

Judgements

xvii. **Mini K T (2017) –** The High Court of Kerala examined a woman's right to non-discrimination in employment, on the basis of their responsibilities towards the care of the family. The Court upheld the right of a woman to take a leave for an extended time, on the ground that she had to look after her child who was suffering from autism. Mustaque, J. while referring to Rawls' Theory of Justice held that, *"a mother cannot be compelled to choose between her motherhood and employment."*[49]

xviii. **Shalini Pathak**[50] **(2014) –** The Uttarakhand High Court erred in its judgement to refuse distinction between temporary, permanent or contractual workers under the ambit of the Act. The SC overruling the judgement referred to the provision of 80 days employment, thus extending the scope and reach of the Act.

xix. **Kakali Ghosh**[51] **(2014) -** The Court discussed the importance of Childcare leave (CCL) for women, which was introduced by the 2009 Amendment in the CCS Leave Rules, 1972[52]. Addressing the issue of uninterrupted CCL of 730 days, the Court acknowledged that such leave extends beyond rearing smaller child, and is also to look after them during examinations and sickness.

[46] *Id.*, s. 12
[47] *Id.*, s. 13
[48] *Id.*, s. 21
[49] *Mini K T v Life Insurance Corporation of India (2017 SCC Online Ker 41588)*
[50] *Shalini Pathak v State of Uttarakhand*, 2014 SCC Online Utt 2233
[51] *Kakali Ghosh v Andaman & Nicobar Administration* [(2014) 15 SCC 300]
[52] Central Civil Services Leave Rules, 1972, Rule 43-C

xx. **Seema Gupta[53] (2006) -** The petitioner governed by the CCS Rules, sought extensions after expiry of maternity leaves. The Supreme Court while relying on the UDHR and the CEDAW granted extensions in furtherance of her fundamental rights under the Indian Constitution.

xxi. **MCD (2000) –** The Corporation contended that daily wage workers are not entitled to maternity leaves under the Act or the CCS Rules because they were engaged in daily wages. Additionally, the Corporation also denied to bring such employees under the ESI Act, 1948. However, the Supreme Court upheld the right to maternity benefit, and supported their judgement with a socio-economic reasoning[54]. The Court held there was no justification to deny benefits Act to casual or daily-wage workers. Highlighting the purpose of the Act, the Court stated it *"aims to provide facilities to a working woman in a dignified manner, so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period."*[55]

Research Gaps

2.1.1. *"There is no doubt that many voices have not been heard when most theories of justice were being shaped."*[56]

Intersectionality and identity deconstruction play a key role in this research, as the researcher attempts to study legal and sociological aspects to explore gendered division of labour causing gender discrimination in the workplace. The existing research is based on data collection and laws of different countries. It would be a mistake to assume that experiences faced by women in the Indian context are the same to those of women respondents in the Western Civilisations.

[53] *Seema Gupta v Guru Nanak Institute Management* (2006 SCC Online Del 1421)
[54] Constitution of India, arts. 39, 42, 43
[55] *MCD v. Female Workers (Muster Roll)*, (2000) 3 SCC 224, para. 33
[56] Susan Okin, "Gender Inequality and Cultural Differences," 22 *Political Theory* 5–24 (2017).

2.1.2. *"Without policy reinforcement, COVID-19 will only deepen social and economic inequalities for women."*[57]

In a report[58] published by the United Nations, the UN Population Fund has highlighted that the existing inequalities have worsened during the time of the COVID crisis. Women are more likely to be driven into poverty, food insecurity, loss of employment, and permanent exclusion from government welfare schemes. The COVID-19 pandemic has exacerbated high unemployment rates among women.[59]

3. RESEARCH PURPOSES AND OBJECTIVES

3.1. Research Purpose:

The purpose of the research is to critique the maternity benefit laws in India. The researcher aims to study and explain the existing legislative framework, conduct a comparative analysis, and explore the possibility of alternative models of maternity benefits.

3.2. Research Objectives:

3.2.1. To critically analyse the legislative framework on maternity laws.

3.2.2. To challenge the distinction between productive-labour in the public sphere, and reproductive-labour in the private sphere.

3.2.3. To draw a comparative analysis of the laws in India to those of other countries.

3.2.4. To give suggestions and policy recommendations to prevent the gendered discrimination of maternity leave in the workplace.

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[57] M Niaz Asadullah and Kalyani Raghunathan, "Fighting Gender Inequality in India during the COVID-19 Pandemic", *The Diplomat*, 25 June 2020, *available at* https://thediplomat.com/2020/06/fighting-gender-inequality-in-india-during-the-covid-19-pandemic/ (last visited on 1 June 2021)

[58] United Nations Population Fund, *COVID-19: A Gender Lens – Protecting Sexual and Reproductive Health and Rights, and Promoting Gender Equality* (March 2020)

[59] Bansari Kamdar, "Women left behind: India's falling Female Labour Participation", *The Diplomat*, 31 July 2020, *available at* https://thediplomat.com/2020/07/women-left-behind-indias-falling-female-labor-participation/ (last visited on 1 June 2021)

4. RESEARCH METHODS

4.1. OPERATIONAL DEFINITIONS AND GUIDING THEORIES

4.1.1. Gender inequality and discrimination

Although the right to equality forms a foundation of national and international Gender inequality refers to the *"socially constructed differences between men and women, which are filtered through traditional notions of masculinity and femininity."*[60] Discrimination at the workplace occurs when there is a bias in opportunities for candidates who are alike in all respects except their gender. This can be measured in at least six different ways.[61]

4.1.2. Public-private dichotomy

"The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggles."[62]

The definitions of "public" and "private" proposed by the feminists Linda Imray and Audrey Middleton rely on *who* is performing the functions rather than *where* it is being performed.[63] Second-wave feminists such as Susan Okin and Carole Pateman problematized, for the first time, the gendered nature of the public-private dichotomy.[64] Bracketing a space with masculine or feminine characteristics provides the necessary justification of gender segregation in society.[65] Therefore, the de-gendering of spaces and increasing the visibility of women can help in breaking the dichotomy.

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[60] VIOLETTA KHOREVA, GENDER INEQUALITY, GENDER PAY GAP, AND PAY INEQUITY: PERCEPTIONS AND REACTIONS IN FINNISH SOCIETY AND WORKPLACES (2012)

[61] Ji-Hye Kim et al., "Gender Discrimination in the Workplace: Effects on Pregnancy Planning and Childbirth among South Korean Women," 16 *International Journal of Environmental Research and Public Health* 1–12 (2019).

[62] Carole Pateman, "Feminist Critiques of the Public-Private Dichotomy", in S.I. Benn, G.F. Gaus (eds.) *Public and Private in Social Life* 281 (New York: St Martin's Press, 1983).

[63] Karen V. Hansen, "Feminist Conceptions of Public and Private: A Critical Analysis" 32 *Berkeley Journal of Sociology* 105–28 (1987).

[64] Ira Chadha-Sridhar & Geetika Myer, "Feminist Reflections on Labour : The 'Ethics of Care' Within Maternity Laws in India" 13 *Socio-Legal Review* 1–19 (2017).

[65] Sreyashi Ghosh, "Beyond Spaces: Debunking Public/Private Divide in Understanding Violence Against Women in India" 1 *International Journal of Gender Studies* 76, 84 (2017).

4.1.3. Productive labour v reproductive labour

There is a gendered separation of social reproduction and economic reproduction, which has widened with the rise of capitalism. The former is seen as non-remunerative and is confined within the domestic sphere; the latter is remunerative and is found with factories and offices. The gendered division of labour institutes subordination of women in a capitalist structure. When maternity and attached responsibilities are seen as break from labour instead of productive labour itself, employees are seen as "subjects" and not individuals, who need to be constantly disciplined by company control. Providing maternity benefits to women assists them to perform their productive and reproductive roles with equal efficiency.[66]

4.1.4. Parental leave and paternity leave

The Indian government is moving positively towards strengthening and implementing maternity benefits. A similar trend is witnessed in the international sphere, with governments enabling gender-neutral parental leaves. The focus is to emphasize the importance of the role of both mother and father in care giving roles after child's birth.

4.2. RESEARCH PROBLEM STATEMENT

Workplace maternity laws are replete with shifting identity constructions. There exists an oppositional discourse of maternity leave, with the intention of maternal care on the one hand and the economically-centred interpretations by the corporates on the other hand. In addition to these conflicting ideologies, there are gendered inconsistencies in the laws and policies, which means there is a restrictive applicability of maternity benefits to male employees. Ignorance and exclusion of the father's rights and responsibilities re-enforces gender roles that care work is the exclusive domain of women. At the intersection of such tensions and conundrums, the existing legislation can be critically analysed to resist gendered discrimination and reshape policies promoting equality of work and the workers.

[66] *Shah v Presiding Officer, Labour Court, Coimbatore & Ors. (1977) 4 SCC 384*

4.3. RESEARCH QUESTIONS

4.3.1. Whether the existing legal framework on maternity benefit in India is sufficient to transcend the public-private dichotomy?

The divide between the public and private sphere reinstates the archaic idea that women are responsible for household chores, while men are employed in institutions outside the domestic sphere. The law operates differently in the public and private spheres. When women start venturing into the professional front, and men start contributing towards the family care, there is a requirement for legislation that can protect their rights at the public-private overlap.

4.3.2. Whether challenging the distinction between productive and reproductive labour will reduce discrimination?

In India, policymakers have employed a *"masculine performance evaluation system"*[67] that subtly enforces stereotypical masculine and feminine expectations, and highlights the difference between the women's lives and the ideal employee image. The legislation drafters adopted a woman-centric lens while framing maternity laws. The assumption is that men and women carry out different roles in society, and may be subject to different laws. There is a requirement to recognise the importance of gender-neutral, all inclusive, paternal leaves.

4.3.3. Whether adopting alternate models of maternity laws can promote equality at the workplace?

The seemingly progressive and rational maternity benefit laws, may in practice be quite harmful to prospects of female workers. In India, the responsibility of payments for extended maternity leave of 26 weeks and compulsory creche facilities have to be borne solely by the employer. The inequitable policies may disincentivise firms from hiring women, which may result in a decline of female participation in the labour force. The Government's social schemes and reimbursements may merely set-off the employer's increased liabilities, but it does not guarantee an end

[67] Patrice M. Buzzanell and Meina Liu, "Struggling with maternity leave policies and practices: A poststructuralist feminist analysis of gendered organizing," 33 *Journal of Applied Communication Research* 1–25 (2005).

to the patriarchal mindset visible in company policies. This means that an increased participation by the Government would only address the manifestations of discrimination, but not the root causes of gender-discriminatory hiring and firing practices.

4.4. MAJOR HYPOTHESES BEING TESTED

4.4.1. Conceptualising maternity leaves as a form of labour will prevent discrimination against women workers.

The divide of public and private suggests that work of care is reproductive labour and not transformative labour. This devaluation curtails women to domestic realms of life, and restricts them to child-bearing and related activities. Employing women becomes an unattractive option.

4.4.2. Enhancing State responsibility and providing incentives to employers will increase employment of women.

Micro, small and medium enterprises would not be able to afford 26-week paid leave policies, unlike their larger counterparts. There is also requirement of more operating capital for creche facilities. Increased maternity leaves have not made women less employable; they have increased burden on employers, which means hiring women has become less favourable.

By viewing maternity protection through the lens of State responsibility, the payment of maternity benefit will not rest solely on shoulders of the employers, and would be borne in some part by the Government. Another option could be amplification of tax rebates or insurance schemes for maternity wages.

4.4.3. Introducing paid Paternity Leave will promote gender equality.

Reducing parental leave benefits to maternity leaves only fortifies the notions of female domesticity. This has a tendency to further deepen the public-private divide. A “parental leave policy” that includes maternity, paternity, adoptive, surrogate, and alternative parenting leaves could be an equitable way to provide support to new

parents. Breaking up the 26-week parental leave among 13 weeks each for men and women could negate any possibility of gender bias.

4.5. RESEARCH METHODOLOGY

The researcher will conduct *doctrinal study*, which includes the *"black-letter"* methodology of analysing legal principles found in primary sources. Additionally, the researcher will adopt the *law-in-context method* of comparative legal approach. Comparative analysis will take into account the way the law works in practice, and how it transpires from judicial decisions.

5. TENTATIVE CHAPTERIZATION

Chapter 1 – Introduction

Chapter 2 – Literature Review

Chapter 3 – Operational definitions and guiding theories

Chapter 4 – Legal framework

Chapter 5 – Models of Maternity Benefits – a comparative study

Chapter 6 – Conclusion and suggestions

6. SCOPE & LIMITATIONS

Scope

The research rests on a three-pronged foundation. Firstly, to differentiate between productive and reproductive labour. Secondly, the researcher wants to address the issue parental leaves could facilitate the re-orientation of societal structure, thereby promoting equality at the workplace. Lastly, the researcher will examine alternate models to maternity laws that promote distribution of responsibilities between State and employers. For a critical analysis of the maternity laws in India, the researcher will employ a comparative approach.

Limitations

The first limitation exists with respect to interpretation of "maternity benefits". This links to the ideas of Care Ethics, according to which, maternity leave is not a break away from work; rather it is the contribution of physical, mental, and emotional energy towards care and upbringing of the child. The legal provisions lay down the right to maternity, and prescribe a time period for the same, but these concepts are not included within definitions. The researcher also understands that there would be a difficulty in applying maternity models of international jurisdictions to that of India. There may be disadvantages and constraints while introducing paternity and parental leaves, or lack of resources preventing State to take up responsibility.

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